

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
SLIM'S CHEVRON STATION,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 83-16

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal from Paragraph 1 of Department of Ecology Order DE 83-130, came before the Pollution Control Hearings Board, David Akana (presiding), Gayle Rothrock, Chairman, and Lawrence J. Faulk at a formal hearing in Spokane on March 10, 1983.

Appellant was represented by its attorney, C. Raymond Eberle; respondent was represented by Charles W. Lean, Assistant Attorney General. Spokane court reporter Michael P. O'Brien recorded the proceeding.

Having heard the testimony, having examined the exhibits, and

1 having considered the contentions of the parties, the Board makes the.

2 FINDINGS OF FACT

3 I

4 Appellant Slim's Chevron Station is a corporation which is an  
5 independent dealer of Chevron Oil Company products. James C. Peters  
6 is an employee and the manager of appellant corporation. Appellant  
7 conducts its business on the corner of East Trent and North Argonne  
8 Road at East 9027 Trent in Spokane.

9 II

10 Respondent Department of Ecology is a state agency charged with  
11 the administration and enforcement of chapter 90.48 RCW.

12 III

13 On December 31, 1982, at about 4 p.m., it became apparent to  
14 appellant's manager that there was a gasoline leak at the service  
15 station when the station ran out of leaded gasoline. Further  
16 investigations revealed that a coupling on one of the dispensing pumps  
17 was spraying gasoline on the ground. Appellant's manager estimated  
18 the gasoline leak to have been about 4000 to 5000 gallons at that  
19 time. After some difficulty, a governmental authority was reached and  
20 the leak reported.

21 IV

22 Appellant's audit of the gasoline inventory for November and  
23 December of 1982, approximated the gasoline loss commencing on or  
24 about November 16, 1982. The total gasoline loss through January 1,  
25 1983 was about 11,990 gallons. A major loss of 7639 gallons occurred  
26 during December 16 through 24, 1982.

V

After discovering the leak, appellant took measures to test for, repair, and prevent the recurrence of gasoline leaks at a cost of about \$3,200.

VI

Beginning on November 24, 1982, and perhaps as early as in October, fumes were detected in some of the Argonne Junior High School buildings located about one tenth of a mile northwest of the station. On November 29, the school began an unsuccessful search to locate the fumes. On January 10, 1983, the fumes became strong enough to have the school evacuated. The school then began a program to locate and remove the source of fumes which would eventually cost at least \$30,000.

Fumes were discovered in underground test holes at various locations in the school yard. An 81 foot deep well was drilled on the west side of the school gymnasium and a three thousand cubic foot per minute venting system was installed to evacuate the fumes. After some adjustments to the system, the fume level in the gymnasium dropped.

VII

Respondent was notified of the gasoline loss on December 31, 1982, through its answering service. On January 12, 1983, respondent's employee visited appellant's service station and the nearby Argonne Junior High School.

VIII

Respondent's concern for the spill relates primarily to the protection of the Spokane Valley aquifer which underlies appellant's

1 service station, the junior high school, and the entire Spokane area.  
2 The aquifer is the sole source of water for the 250,000 people in the  
3 area. The shallow aquifer is in extremely permeable soil. At  
4 appellant's service station, the aquifer is about 65 feet below  
5 ground. Water travels through the aquifer at a rate of several  
6 hundred feet per day in a generally east to west direction.

7 There are several public water wells down-gradient, about a half  
8 mile radius from the service station.

9 IX

10 The state of the expert opinions is that the approximately 12,000  
11 gallons of gasoline may or may not have reached the main aquifer.  
12 Some or all of the gasoline may be retained in the soil, or perched on  
13 a clay seam, or carried away by the water in the aquifer. If the  
14 gasoline reached the aquifer, it is not likely to be drawn from the  
15 surface of the water into the intake of a submerged water well pump.  
16 Compared to the amount of water flowing through the aquifer, 12,000  
17 gallons of gasoline is small.

18 Appellant's spill may or may not have caused or contributed to the  
19 fumes detected at the Argonne Junior High School.

20 X

21 Testimony disclosed that paragraph 1 of respondent's order is  
22 intended to require appellant to cause a study to be prepared which  
23 would determine the extent and lateral movement of the fuel plume, the  
24 amount of gasoline that reached the ground water table, and the  
25

1 possibility of recovering the fuel.<sup>1</sup>

2 Appellant asserts that the cost of such a study would exceed  
3 \$30,000 and nothing more could be gained from the study.

4 XI

5 Any Conclusion of Law which should be deemed a Finding of Fact is  
6 hereby adopted as such.

7 From these Findings the Board comes to these

8 CONCLUSIONS OF LAW

9 I

10 Appellant's manager is not personally responsible for complying  
11 with respondent's order. That responsibility is directed at Slim's  
12 Chevron Station, a corporation, by the terms of the order.

II

14 RCW 90.48.080 provides:

15 It shall be unlawful for any person to throw, drain,  
16 run, or otherwise discharge into any of the waters of  
17 this state, or to cause, permit or suffer to be  
18 thrown, run, drained, allowed to seep or otherwise  
19 discharged into such waters any organic or inorganic  
20 matter that shall cause or tend to cause pollution of  
21 such waters according to the determination of the  
22 commission, as provided for in this chapter.

20 1. Paragraph 1 provides that Slim shall:

21 Conduct a hydrological investigation to determine the  
22 estimated volume of gasoline that reached the ground  
23 water. The study shall identify the extent of  
24 lateral migration of gasoline from the spill site.  
25 Work shall commence within seven (7) days of receipt  
26 of this Order.

1 Gasoline is a matter which can cause "pollution" of the waters of the  
2 state. RCW 90.48.020. The Spokane Valley aquifer waters are  
3 underground waters which are included within the phrase "waters of the  
4 state." RCW 90.48.020; RCW 90.48.315(10).

5 III

6 RCW 90.48.320 provides in relevant part:

7 It shall be unlawful, except under the circumstances  
8 hereafter described in this section, for oil to enter  
9 the waters of the state from any ship or any fixed or  
10 mobile facility or installation located offshore or  
11 onshore whether publicly or privately operated,  
regardless of the cause of the entry or fault of the  
person having control over the oil, or regardless of  
whether it be the result of intentional or negligent  
conduct, accident or other cause. . . .

12 "Oil" includes gasoline. RCW 90.48.315(7). Appellant's service  
13 station is a "fixed . . . facility" which is located above the Spokane  
14 Valley aquifer, a water of the state.

15 IV

16 RCW 90.48.120 provides:

17 (1) Whenever, in the opinion of the department, any  
18 person shall violate or is about to violate the  
19 provisions of this chapter, or fails to control the  
20 polluting content of waste discharged or to be  
21 discharged into any waters of the state, the  
22 department shall notify such person of its  
23 determination by registered mail. Such determination  
24 shall not constitute an order or directive under RCW  
25 90.48.135. Within thirty days from the receipt of  
notice of such determination, such person shall file  
with the department a full report stating what steps  
have been and are being taken to control such waste  
or pollution or to otherwise comply with the  
determination of the department. Whereupon the  
department shall issue such order or directive as it  
deems appropriate under the circumstances, and shall  
notify such person thereof by registered mail.

1 (2) Whenever the department deems immediate action  
2 is necessary to accomplish the purposes of chapter  
3 90.48 RCW, it may issue such order or directive, as  
4 appropriate under the circumstances, without first  
5 issuing a notice or determination pursuant to  
6 subsection (1) of this section. An order or  
7 directive issued pursuant to this subsection shall be  
8 served by registered mail or personally upon any  
9 person to whom it is directed.

6 Under the foregoing provision it must be shown that appellant is  
7 violating or about to violate the provisions of chapter 90.48 RCW, or  
8 has failed to control pollution discharged or about to be discharged  
9 into state waters.

10 V

11 Appellant is subject to the provisions of both RCW 90.48.080 and  
12 RCW 90.48.320. However, it was not shown by a preponderance of the  
13 evidence, that oil "entered" or was otherwise discharged into the  
14 waters of the state from appellant's facility to make those provisions  
15 operable. These are not the issues in this case, however.

16 VI

17 Appellant has taken remedial measures to control and reduce the  
18 risk of future gasoline spills. It is not known whether the gasoline  
19 spilled has reached state waters, or can be controlled or prevented  
20 from entering state waters. This latter inquiry is the thrust of  
21 paragraph 1 of the respondent's order, and to which appellant objects.

22 The burden of proof in this matter is upon the respondent. The  
23 order, as written, casts the crucial, factual inquiries on appellant.  
24 This procedure is not appropriate. See RCW 90.48.340. Even if  
25 appropriate, other than speculation, respondent has no persuasive

1 evidence which can support its order. It is apparent, therefore, tha  
2 paragraph 1 of the order should be stricken.

3 VII

4 Respondent is not without remedy, nor is appellant without  
5 responsibility, for the spill. RCW 90.48.330 authorizes respondent to  
6 take necessary steps to investigate, survey and take action with  
7 respect to oil discharged into state waters where such actions are  
8 designed to protect the public interest or property.

9 Any person who fails to take appropriate action for oil entering  
10 the state waters when required to do so (by RCW 90.48.325) is  
11 responsible for the "necessary expenses" incurred by the state under  
12 RCW 90.48.330. RCW 90.48.335; RCW 90.48.340. "Necessary expenses" do  
13 not include expenses relating to investigation or the performance of  
14 surveillance. RCW 90.48.340.

15 Respondent may assess civil penalties for unlawful discharges of  
16 oil. RCW 90.48.350; RCW 90.48.144.

17 When oil enters the state waters, there is strict liability for  
18 damages to persons or to public or private property. RCW 90.48.336.

19 VIII

20 The findings and conclusions of this order address only whether  
21 respondent's order issued under RCW 90.48.120(2) was appropriate under  
22 the law. Whether oil entered or is about to enter state waters is not  
23 necessary to support the decision reached.

24 IX

25 Any Finding of Fact which should be deemed a Conclusion is hereby  
26 adopted as such.



1 From these Conclusions the Board enters this

2 ORDER

3 Paragraph 1 of Department of Ecology Order Docket No. DE 83-130 is  
4 stricken.

5 DONE this 24<sup>th</sup> day of March, 1983.

6 POLLUTION CONTROL HEARINGS BOARD

7  
8 David Akana  
9 DAVID AKANA, Lawyer Member

10 Gayle Rothrock  
11 GAYLE ROTHROCK, Chairman

12 Lawrence S. Faulk  
13 LAWRENCE S. FAULK, Member  
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